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NOTES

THE DOCTRINE OF ILLEGALITY AND PETTY OFFENDERS: CAN QUASI-CONTRACT BRING JUSTICE?

I. Introduction

It is well settled that a bargain will not be enforced if "either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."¹ This "hands off" attitude toward illegal bargains² is one of our most durable common law doctrines. Not only has it withstood the test of judicial scrutiny since time immemorial, but it has been endorsed by modern commentators as fundamentally sound. Williston has declared that any other rule would be "anomalous,"³ while Corbin has praised the doctrine for its "salutary effect" in causing obedience to the law.⁴

Common sense suggests that a doctrine with such ancient vintage and impressive credentials should be immune from attack at this late date. However, throughout its long history the doctrine has never been immune from challenge. Its tendency to disproportionately penalize plaintiffs and unjustly enrich defendants has caused noticeable traces of uneasiness among both judges and scholars.⁵ For example, Lord Mansfield applied the rule, but he did so with an apology for its shortcomings:

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant.

1 1 MURPHY, CONTRACTS 559 (1963); RESTATEMENT, CONTRACTS § 512 (1932).

2 Corbin suggests that the term "illegal contract" contradicts itself, since by definition a contract is legally enforceable. 6A CORBIN, CONTRACTS § 1373 (1962). However, most courts have found it both harmless and convenient to use "illegal bargain" and "illegal contract" interchangeably.

3 VI WILLISTON, CONTRACTS 4842 (1938).

4 6A CORBIN, CONTRACTS 716 (1962).

5 The Kansas Supreme Court has expressed this uneasiness by asking an almost unanswerable question:

Why should one party to a contract be allowed to avoid the payment of debts he has contracted to pay, and thus gain an unconscionable advantage, because the other party deliberately, or through inability or mere oversight, has failed to discharge an obligation to the city, when there is available to the city both a civil remedy for the wrong and a penal remedy against the wrongdoer? *Manker v. Tough*, 79 Kan. 46, 53, 98 Pac. 792, 795 (1908).

Kentucky has also noted that the rule is not so universally valid as to deserve unthinking, wooden application to every illegal bargain: "It is probable that a rule like this may, in some instances, work a hardship by permitting one person to get the benefit of another person's labor, service or property without compensation." *Hays v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 131, 290 S.W. 1028, 1029 (1927).

Likewise, a great number of other courts have expressed dissatisfaction with the rule as applied to minor statutory violations. *E.g.*, *National Bank v. Whitney*, 103 U.S. 99 (1880); *McCullough Transfer Co. v. Virginia Sur. Co.*, 213 F.2d 440 (6th Cir. 1954); *Dunlop v. Mercer*, 156 Fed. 545 (8th Cir. 1907); *Ambro Advertising Agency v. Speed-Way Mfg. Co.*, 211 Iowa 276, 233 N.W. 499 (1930); *Scott v. Apgar*, 238 La. 29, 113 So. 2d 457 (1959); *Fosdick v. Investors' Syndicate*, 266 N.Y. 130, 194 N.E. 58 (1934); *Uhlmann v. Kin Daw*, 97 Or. 681, 193 Pac. 435 (1920); *Chapman v. Zakzaska*, 273 Wis.64, 76 N.W.2d 537 (1956).

However, in the absence of extraordinary circumstances, all these courts apply the doctrine to minor regulatory violations as well as to major penal offenses. *E.g.*, *Howard v. Lebbly*, 197 Ky. 324, 246 S.W. 828 (1923); *Van Horn v. Vining*, 133 So. 2d 901 (La. App. 1961); *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say.⁶

Certain scholars have been less tolerant of the doctrine's failings. In 1891 Wigmore launched the most notable attack on the doctrine:

[T]he whole notion is radically wrong in principle and produces extreme injustice. If A owes B \$5,000 why should he not pay it whether B has violated a statute or not? Where the issue is as to the rights of two litigants, it is unscientific to impose a penalty incidentally by depriving one of the litigants of his admitted right. . . . If there is one part of criminal jurisprudence which needs even more careful attention than it now receives it is the apportionment of penalty to offense. Yet the doctrine now under consideration requires, with monstrous injustice and blind haphazard, that the plaintiff shall be mulcted in the amount of his right, whatever that may be. . . . [A] fine of thousands of dollars may be imposed for petty violations of the law. One cannot imagine why we have so long allowed such an unworthy principle to remain.⁷

Wigmore's attack is difficult to parry. The doctrine of illegality is undeniably a clumsy method of punishing wrongdoers, and it reaches a pinnacle of clumsiness when applied to a plaintiff whose only "wrong" is that he violated a minor regulatory statute. As Corbin has noted, such a petty offender has often "rendered excellent service or delivered goods of the highest quality, his noncompliance with the statute seems nearly harmless, and the real defrauder seems to be the defendant who is enriching himself at the plaintiff's expense."⁸

Wigmore suggested that the courts remedy this injustice by enforcing all contracts, while deducting a reasonable penalty proportioned to the plaintiff's offense.⁹ This suggestion has been ignored by the courts, probably because it represents such a radical break from traditional common law methods.¹⁰ However, if Wigmore's proposed cure was ill-advised, it should not obscure the validity of his criticism. Nonenforcement is a poor method of punishing petty offenders. An alternative is badly needed. If Wigmore's cure is too drastic, the courts must find an adequate, less drastic, solution.

Unfortunately, however, judicial attempts at remedying the doctrine's defects have been patently ineffective. The purpose of this note is to explore the deficiencies of these efforts and to analyze quasi-contractual relief as a possible cure for the doctrine's obvious defects.

II. Scope

This note is confined to contracts whose formation or performance violates a legislative mandate. Adhesion contracts, contracts in restraint of trade, or other contracts violative of judge-made law are not considered. Instead,

6 Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775).

7 Wigmore, *A Summary of Quasi-Contracts*, 25 AM. L. REV. 695, 712-13 n.k (1891).

8 6A CORBIN, CONTRACTS 713 (1962).

9 Wigmore, *A Summary of Quasi-Contracts*, 25 AM. L. REV. 695, 712-13 n.k (1891).

10 CHAFEE, SOME PROBLEMS OF EQUITY 38 (1950).

this note concentrates on statutory violations, because it is in this area that the doctrine of illegality is rigid, unbending, and productive of harsh results. Once the courts ascertain that a contract conflicts with a statute, they refuse to enforce it almost as a matter of course.¹¹ As a result of this rigid policy, statutory offenders suffer the injustice of being punished *twice* — once by the legislature and once by the courts.¹²

Nonstatutory illegality has been excluded from the present analysis because, unlike statutory illegality, it is not plagued with the problems of inflexibility and double punishment. While judicially construing illegality, the courts tend to engage in a delicate balancing of all the interests involved. Nonenforcement does not rest on a mechanistic determination that the contract is in conflict with a statute, but on a carefully considered judgment that the contract is too harsh and unconscionable to be enforced.¹³ More importantly, nonenforcement is the *only* penalty imposed, since the legislature has not enacted a punishment of its own.

Statutory violations will be approached by separating them into two subclasses: violations which involve moral turpitude (Part III below) and violations which do not (Part IV below). This division is made because the doctrine of illegality should treat petty offenders less severely than it does underworld characters. It could be argued that any distinction resting on "moral turpitude" would be too uncertain to yield reasonably predictable results. However, as the Supreme Court noted in *Morissette v. United States*,¹⁴ the entire history of the common law suggests that such a distinction is possible:

[C]ourts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "scienter," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability.¹⁵

11 This attitude is typified by the rule laid down by the California Supreme Court in *Smith v. Bach*: "A statute . . . prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way." 183 Cal. 259, 262, 191 Pac. 14, 15 (1920).

The following cases further illustrate this rigid approach to statutory violations: *Southern Metal Treating Co. v. Goodner*, 271 Ala. 510, 125 So. 2d 268 (1960); *Van Horn v. Vining*, 133 So. 2d 901 (La. App. 1961); *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321 (1958).

12 A few courts have recognized the dangers of cumulative penalties, for example:

The purpose of the [statutory] penalty is to secure obedience to the statute to the end that its object may be accomplished. But the object of the statute, as above stated, is certainly not accomplished or even furthered by adding to the penalty expressly imposed the additional one of the loss of goods, chattels, or services sold or performed by one doing business in violation of the statute. Such a cumulative penal result is scarcely commensurate with the evil sought to be remedied. *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 133, 290 S.W. 1028, 1029-30 (1927).

However, like other states which have occasionally denounced the doctrine, Kentucky continues to apply it to most situations. Kentucky's adherence to the general rule is apparent in *Tussey v. Felty*, 206 Ky. 506, 267 S.W. 765 (1924). Other states have questioned the rule, yet continue to apply it. See the text accompanying note 5 *supra*.

13 *E.g.*, *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948); *Sandler v. Commonwealth Station Co.*, 307 Mass. 470, 30 N.E.2d 389 (1940); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953).

14 342 U.S. 246 (1952).

15 *Id.* at 252.

If such formulae are workable in other areas of the law, they should be workable in the area of illegality.

III. Statutory Violations Involving Moral Turpitude

Without exception, the courts do not enforce bargains which violate major penal statutes. This policy of nonenforcement was first announced by Lord Holt in *Bartlett v. Vinor*,¹⁶ an English case decided in 1693:

[E]very contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, tho' the statute it self doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho' there are no prohibitory words in the statute.¹⁷

This rule is correct when applied to statutory violations involving moral turpitude, though its basis does not appear to be legislative intent, as Lord Holt seems to have suggested. The basic fallacy in Lord Holt's theory is that "the legislature, when adopting a penal statute, has rarely had in mind the problems of contract law that may later arise."¹⁸ When the lawmakers have given no thought to a problem, legislative intent does not exist.

In reality, the rationale of nonenforcement is purely a judicial creation, grounded in the hope that it will deter violations of the law, and in the fear that any other policy would damage the dignity of the courts.¹⁹ The validity of the doctrine of illegality rests, not upon the presence or absence of legislative intent, but upon the validity or invalidity of these two underlying policies. Thus, in every case the court must face two difficult questions: 1) Will nonenforcement deter violation of the law? 2) Will enforcement damage the dignity of the court? If the answer to both of these questions is in the negative, the contract should be enforced without hesitation.

Does nonenforcement of illegal bargains deter violations of the criminal law? When serious crimes are involved, the answer is, never. If a man is not deterred by the prospect of several years in a lonely cell, he will not be discouraged by a court's refusal to enforce his illegal bargain. Furthermore, more serious offenders seldom rely on judicial sanctions to keep their internal affairs in order. They have other, less public, ways of enforcing their agreements.

Quite clearly, the dignity of a court would be impaired if it enforced a serious, criminal contract. This is illustrated by a case recently reported by *Newsweek Magazine*:

The crocodile man had a fixed price for chewing up a victim. It was 90 shillings (\$12.60), payable on completion of the job.

This seemed reasonable to 33-year-old Odrick Kanshoche, a villager inhabiting the swamps along the Shire River in the British African dependency of Nyasaland, for he thought he was haunted by the witchcraft

16 Carth. 251, 90 Eng. Rep. 750 (1693).

17 *Id.* at 252, 90 Eng. Rep. at 750.

18 Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 682 (1935).

19 Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allow- ing Restitution*, 25 TEXAS L. REV. 31, 59 (1946).

of an 8-year-old girl named Ponda Cement. So he hired the crocodile man.

The crocodile man, 35-year-old Ellard Chipandare, performed his usual incantations, slipped into a crocodile skin, and began drifting down the Shire toward the spot where the girl was getting water. When her mutilated body was found, the authorities assumed a real crocodile had attacked her. They listed it as "death by misadventure."

They didn't learn otherwise until Odrick reneged on his payments. He said that all he could pay was 10 shillings down and the rest "later," on the monthly installment plan.

The crocodile man didn't approve of the installment plan, however. So he went to court and sued for his money.

At the hearing before the Chikwawa Native Authority Court, Odrick defended himself by telling the judge, Chief Chapananga, that he had ordered not one but two "crocodile rituals," for there was another girl who also haunted him. Therefore, he said, the crocodile man hadn't completed his part of the deal and hadn't any legal claim.

Judge Chapananga ruled in favor of the crocodile man, however. He ordered Odrick to pay 50 shillings (\$7) for the completed half of the bargain.

It was a perfectly understandable decision and the court had full legal jurisdiction over a civil case on nonpayment of debt, said a British police officer. After waiting until native justice had been carried out, Her Majesty's representative last week arrested both the crocodile man and his client on charges of murder.²⁰

This result is obviously wrong, but not because the court has passed up an opportunity to deter future crimes. Indeed, it appears that the policy of keeping the courts open to criminals was of great assistance in bringing two dangerous men to justice. The distasteful aspect of the crocodile case is that the court appeared to approve the conduct of the parties by giving them precise and solicitous justice. It was beneath the dignity of the court to abjectly cooperate with the parties in picking up the pieces of their outrageous bargain. The parties should have been turned away in symbolic rejection of their evil transaction.²¹

This theory of rejection is subject to a crucial limitation. The courts should *never* drive a plaintiff away from the seat of justice when ordinary men would not consider him guilty of serious wrongdoing. As has been noted in a related context, "to inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement."²² Moral turpitude is the key. Courts will not gain respect by punishing morally innocent men,²³ though in some contexts the theory of deterrence may justify nonenforcement of executory bargains, even when the parties are morally innocent.

20 Newsweek, September 10, 1962, p. 54.

21 "The real objection is not to one man's clean hands, but to the whole enterprise. The court does not want to touch an unlawful transaction with a ten-foot pole." CHAFEE, *op. cit. supra* note 10, at 31. For a thorough analysis see Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 TEXAS L. REV. 31 (1946).

22 Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933).

23 As Justice Holmes noted, "even a dog distinguishes between being stumbled over and being kicked." HOLMES, *THE COMMON LAW* 3 (1881).

IV. Statutory Violations Not Involving Moral Turpitude

Traditionally, there could be "no crime large or small without an evil mind."²⁴ However, the past century has witnessed the growth of a distinct group of statutory offenses punishable without the traditional requirement of moral turpitude.²⁵ As these statutes have mushroomed in importance, increasing numbers of morally innocent, petty offenders have been denied enforcement of their contracts. The remainder of this note will concentrate on these petty offenders to determine whether justice demands that the doctrine of illegality be modified to allow limited enforcement of their illegal bargains.

Petty offenders usually become entangled in the doctrine of illegality by violating an occupational licensing statute. These guild-type statutes make it unlawful for persons to engage in certain occupations without first receiving a license from the state.²⁶ Originally confined to the professions, these restrictive laws have lately spread to common occupations and affected the validity of a wide variety of contracts.²⁷ Like most regulatory measures, occupational licensing statutes fix their own penalty. Their violation is usually a misdemeanor punishable by fine and/or imprisonment, leaving discretion in the trial judge to impose the appropriate sanction.²⁸ Occasionally, a statute will also require the forfeiture of conflicting contract rights. Of course, in such cases the courts can only obey the legislative fiat.²⁹

Express forfeitures are rarely enacted.³⁰ Furthermore, as in the case of penal statutes, there are usually no indications of legislative desire to make regulatory measures destructive of conflicting contract rights.³¹ As a result, the courts have been forced to decide whether it is possible to enforce contracts violative of regulatory measures without diluting the statutory penalties and depriving the public of the benefits of regulation.

The search for a just and viable method of enforcing these *malum prohibitum* contracts has been a frustrating one. Not only are the courts in conflict as to which rule should be applied and when, but very often the decisions within a single jurisdiction are hopelessly at odds.³² The following rules have

24 Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

25 Gellhorn, *Occupational Licensing—A Nationwide Dilemma*, 109 J. ACCOUNTANCY 39 (1960).

26 For a thorough discussion of the many problems created by occupational licensing see GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* (1956).

27 Gellhorn, *Occupational Licensing—A Nationwide Dilemma*, 109 J. ACCOUNTANCY 39, 40 (1960).

28 See the following cases and the statutes cited therein: *Hall v. Bowman*, 88 Ariz. 409, 357 P.2d 149 (1960); *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957).

29 *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 151, 308 P.2d 713, 719 (1957).

30 6A CORBIN, *CONTRACTS* 714 (1962).

31 Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 682 (1935).

32 Focusing on one jurisdiction, three rules coexist in California: (1) "A statute . . . prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way." *Smith v. Bach*, 183 Cal. 259, 262, 191 Pac. 14, 15 (1920); (2) A contract will be enforced if "the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality." *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 151, 308 P.2d 713, 719 (1957) (dictum); (3) "Where, as here, the alleged illegal transaction has been terminated, public policy is not served or public policy protected by denying one party to the contract relief against the other." *Wilson v. Stearns*, 123 Cal. App. 2d 472, 482, 267 P.2d 59, 66 (1954).

The law in the state of Washington is also confused, for the supreme court has applied

been applied by various courts at various times: penalty implies prohibition;³³ penalty is prima facie evidence of prohibition;³⁴ penalty implies prohibition except when "disproportionate hardship" would result;³⁵ penalty implies exclusion of extrastatutory punishment;³⁶ and penalty prohibits contractual relief, but allows recovery in quasi-contract for benefits conferred.³⁷

A. Penalty Implies Prohibition

The courts generally apply Lord Holt's rigid dictum to all statutory violations without regard to the degree of illegality involved:

The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. . . . The imposition by statute of a penalty implies a prohibition

two rules without adequately distinguishing them: (1) A contract violative of a police power regulation will not be enforced, although a severable, legal part of it will be. *Lund v. Bruflat*, 159 Wash. 89, 292 Pac. 112 (1930). (2) "It is a general proposition, sustained by the weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other." *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 334, 133 Pac. 595 (1913).

The law of illegality in New York is so fragmented that the courts have a wide choice with regard to regulatory violations — something which is convenient for the courts but exasperating for lawyers and clients: (1) "This was an illegal transaction and under our settled rules we refuse to aid in it but leave the parties where they are." *Spivak v. Sachs*, 16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 957 (1965); (2) Champertous agreements, although illegal, are enforceable in quasi-contract. *Harvey v. F.W. Dodge Corp.*, 169 Misc. 781, 8 N.Y.S.2d 935 (1938); (3) "If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied." *Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 278, 11 N.E.2d 908, 909 (1937) (partial basis); (4) "[W]here the wrong committed by the violation of the statute is merely *malum prohibitum*, and does not endanger health or morals, such additional punishment should not be imposed unless the legislative intent is expressed or appears by clear implication." *Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 280, 11 N.E.2d 908, 910 (1937) (partial basis).

33 The leading case is *Bartlett v. Vinor*, Carth 251, 90 Eng. Rep. 750 (1693). Other cases are: *Southern Metal Treating Co. v. Goodner*, 271 Ala. 510, 125 So. 2d 268 (1960); *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14 (1920); *Van Horn v. Vining*, 133 So. 2d 901 (La. App. 1961); *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965); *Cope v. Rowlands*, 2 M. & W. 149, 150 Eng. Rep. 707 (1836).

34 *E.g.*, *McLamb v. Phillips*, 34 Ga. App. 210, 129 S.E. 570 (1925); *Beecher v. Peru Trust Co.*, 49 Ind. App. 184, 97 N.E. 23 (1912); *Howard v. Lebby*, 197 Ky. 324, 246 S.W. 828 (1923); *William Coltin & Co. v. Manchester Sav. Bank*, 105 N.H. 254, 197 A.2d 208 (1964); *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321 (1958).

35 *Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 11 N.E.2d 908 (1937) (partial basis). Other cases include *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957) (dictum); *Schloss v. Davis*, 213 Md. 119, 131 A.2d 287 (1957); *Wallach v. Katzonwitz*, 171 Misc. 287, 12 N.Y.S.2d 514 (1939).

36 The leading case is *Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 11 N.E.2d 908 (1937) (partial basis). Others include *Macco Constr. Co. v. Farr*, 137 F.2d 52 (9th Cir. 1943); *Dunlop v. Mercer*, 156 Fed. 545 (8th Cir. 1907); *In Re Johnson*, 224 Fed. 180 (W.D. Wash. 1915); *Sajor v. Ampol, Inc.*, 275 N.Y. 125, 9 N.E.2d 803 (1937); *Way v. Pacific Lumber & Timber Co.*, 74 Wash. 332, 133 Pac. 595 (1913).

37 Outside the area of champertous agreements, where a majority of courts allow quasi-contractual recovery, the decisions favoring this rule are largely limited to California: *Nichols v. Boswell-Alliance Constr. Corp.*, 181 Cal. App.2d 584, 5 Cal. Rptr. 546 (Dist. Ct. App. 1960); *Wilson v. Stearns*, 123 Cal. App.2d 472, 267 P.2d 59 (Dist. Ct. App. 1954); *Norwood v. Judd*, 93 Cal. App.2d 276, 209 P.2d 24 (Dist. Ct. App. 1949).

of the act to which the penalty is attached, and a contract founded upon such act is void.³⁸

Many courts defend this rigid attitude toward petty offenders by invoking Lord Holt's old pretense that the legislature intended the forfeiture of all contractual rights conflicting with legislative enactments.³⁹ Other courts, apparently recognizing that the doctrine of illegality is a judicial and not a legislative creation, have attempted to justify their decisions on more realistic grounds. The most substantial justification offered by these courts is that enforcement of *malum prohibitum* bargains would dilute statutory penalties and encourage regulatory violations.⁴⁰ This argument cannot be rebutted by saying that petty offenders would not use the courts even if the doors of justice were open to them. Unlike traditional criminals, such petty offenders often have much to gain and little to lose by taking their contracts to court.⁴¹

Yet, even in the area of minor violations, nonenforcement has a limited deterrent effect. Nonenforcement is a cumulative punishment imposed by the courts in addition to the regular statutory penalty. Thus, whenever the statutory deterrent is sufficient standing by itself, nonenforcement serves no *positive* function. Rather, it serves only the *negative* function of preventing contract damages from diluting the statutory deterrent. The evil of contract damages is that petty offenders are reimbursed for the loss of anticipated profits. Such profits can be used to pay statutory fines as a "cost of doing business." By eliminating this profit element, nonenforcement allows statutory fines to operate with full impact upon offenders.

The negative function of nonenforcement is most efficient when applied to illegal bargains which are purely executory. Since the plaintiff has suffered no out-of-the-pocket damages, an award would consist entirely of anticipated profits; thus, the statutory penalty would almost certainly be nullified by enforcement. Furthermore, there are no conflicting policies to be considered because the twin dangers of unjust enrichment and disproportionate penalty are nonexistent. Since neither party has performed, the *status quo* can be maintained with no loss but that of the bargain.⁴² However, the deterrent theory breaks down when applied to contracts which are partially or wholly executed. Since the plaintiff has rendered valuable performance, nonenforcement not only pre-

38 *Contractor's Safety Ass'n v. California Compensation Ins. Co.*, 48 Cal.2d 71, 76, 307 P.2d 626, 629 (1957).

39 *E.g.*, *Knight v. Watson*, 221 Ala. 69, 127 So. 841 (1930); *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14 (1920); *Van Horn v. Vining*, 133 So. 2d 901 (La. App. 1961).

40 The Pennsylvania Supreme Court has stated the argument in these terms:

There is no force to plaintiff's contention that the penalties imposed by these statutes are intended to be the sole punishment for infractions thereof. If the courts were to enforce such unlawful contracts the relatively small fines to which violators of the law are made subject would be insufficient to discourage repeated violations. *F.F. Bollinger Co. v. Widmann Brewing Corp.*, 339 Pa. 289, 294, 14 A.2d 81, 84 (1940).

The statute in *Bollinger* punished violators by fine alone. The dilution argument would seem to be less valid as applied to the vast majority of regulatory measures, which provide for fine and/or imprisonment. The prospect of a thirty-day jail term is probably enough to deter most businessmen, even if a tidy profit is possible and the contract is judicially enforceable. Compare the text accompanying notes 5 and 12 *supra*.

41 Even though the hope of recovery is nil, there are a vast number of petty offender cases in the reports.

42 6A CORBIN, CONTRACTS 817 (1962).

vents him from realizing anticipated profits but also from recovering out-of-the-pocket expenses. It is this denial of actual damages that Wigmore so vehemently complained of.⁴³ The doctrine of illegality should be limited to its negative function of preventing the dilution of statutory penalties and should never impose extrastatutory penalties which result in harshness and injustice without significant deterrent effect.

The doctrine of quasi-contract could be of great service once contracts have been executed. By denying recovery for anticipated profits while reimbursing the plaintiff for his out-of-the-pocket expenses, quasi-contract would eliminate the problems of disproportionate penalty and unjust enrichment without diluting statutory penalties. The courts, however, have been slow to grant quasi-contractual relief in this area.⁴⁴ They have preferred to grant total relief or deny it completely.

B. Penalty is Prima Facie Prohibition

The courts have developed a number of limited devices for granting total relief to petty offenders. The most common attempts to introduce an element of flexibility into the general rule by replacing Lord Holt's conclusive presumption with a rebuttable presumption of nonenforceability.⁴⁵ The courts following this rule hold that a statutory penalty does not debar them from attempting to discover whether the legislature actually intended to destroy conflicting contract rights. The extent of additional inquiry a court is willing to undertake varies considerably from jurisdiction to jurisdiction. Most will inquire far enough to discover whether the statute is a revenue measure or a police power regulation, since it is presumed that the legislature would not intend to destroy contractual rights with tax statutes.⁴⁶ *William Coltin & Co. v. Manchester Sav. Bank*⁴⁷ contains a good statement of the revenue measure exception:

If all the relevant factors indicate the purpose of such a statute is the collection of revenue, the express statutory penalties are usually held to be exclusive and contracts made without a license are not thereby made unenforceable. If on the other hand the statute is an exercise of the police power and is designed to protect the public against fraud and incompetence, the lack of license will not only subject a violator to the express statutory penalty but he will be unable to enforce his bargain and collect his commission.⁴⁸

In addition to the narrow revenue measure exception, many courts have adopted a broader legislative intent exception, which is best stated in this oft-quoted passage:

The rule that a contract is invalid if it conflicts with a statute is not an

⁴³ See note 7 *supra*.

⁴⁴ See note 37 *supra*.

⁴⁵ VI WILLISTON, CONTRACTS § 1763, at 5004 (1938).

⁴⁶ E.g., *Gatti v. Highland Park Builders*, 27 Cal.2d 687, 166 P.2d 265 (1946); *Turner v. Schmidt Brewing Co.*, 278 Mich. 464, 270 N.W. 750 (1936); *William Coltin & Co. v. Manchester Sav. Bank*, 105 N.H. 254, 197 A.2d 208 (1964); *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321 (1958).

⁴⁷ 105 N.H. 254, 197 A.2d 208 (1964).

⁴⁸ *Id.* at 256, 197 A.2d at 210.

inflexible one. The true rule seems to be that the question is one of legislative intent. . . . The courts will always look to the language of the statute, the subject matter, the wrong or evil which it seeks to remedy or prevent, and the purpose sought in its enactment, and, if from all these it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold and construe the statute accordingly.⁴⁹

Although broad in its terms, this exception is narrow in practice, because it places the burden of persuasion on the party seeking to enforce the bargain. Since legislative intent is virtually nonexistent in this area, such a burden is impossible to sustain. In effect, the exception is limited to regulatory statutes which are so petty that nonenforcement of conflicting bargains would be absurd. For example, when an opportunistic customer refuses to pay his just debt to a "Hardware Hank Store" on the ground that its owner has not filed under the state's Fictional Name Statute.⁵⁰ No court would accept such an argument, since it would impose too stringent a penalty for a very petty breach of the law.⁵¹

C. Exception for "Disproportionate Hardship"

In *Rosasco Creameries, Inc. v. Cohen*⁵² the New York Court of Appeals refused to apply the doctrine of illegality to a bargain which violated the state's Milk Control Law. The court did so, partially on the grounds that since substantial and valuable performance had been rendered under the contract, a denial of relief would be "wholly out of proportion to the requirements of public policy or appropriate individual punishment. . . ."⁵³ Corbin has praised this exception as allowing continued maintenance of the general rule of nonenforcement, "while still permitting the court[s] to consider the merits of the particular case and to avoid unreasonable penalties and forfeitures."⁵⁴ However, the rule is frightfully uncertain and subjective in its application. In addition, it suffers because it grants contractual, rather than quasi-contractual relief. The courts, apparently feeling that a widespread allowance of contractual relief would dilute statutory deterrents, have limited the exception to disproportionate hardships of an extraordinary nature.⁵⁵ This niggardly application of the exception has done

49 C.J.S. *Contracts* § 201 (1963). The leading case is *Harris v. Runnels*, 53 U.S. 79 (1851). Other significant cases include *Pangborn v. Westlake*, 36 Iowa 546 (1873); *Uhlmann v. Kin Daw*, 97 Or. 681, 193 Pac. 435 (1920); *Chapman v. Zakaska*, 273 Wis. 64, 76 N.W.2d 537 (1956).

50 Such statutes make it unlawful to carry on a business under a trade name other than the true surname of the owner. The purpose of these statutes is to prevent frauds upon consumers, but a great many innocent businessmen inadvertently fail to comply with the statutory requirements. Many cases applying the legislative intent exception have involved these Fictional Name Statutes. For example: *Ambro Advertising Agency v. Speed-Way Mfg. Co.*, 211 Iowa 276, 233 N.W. 499 (1930); *Hayes v. Providence Citizens' Bank & Trust Co.*, 218 Ky. 128, 290 S.W. 1028 (1927); *Huey v. Passarelli*, 267 Mass. 578, 166 N.E. 727 (1929).

51 But see *Colbert v. Ashland Constr. Co.*, 176 Va. 500, 11 S.E.2d 612 (1940), citing RESTATEMENT, *CONTRACTS* § 580, comment a (1932):

The legislature can prohibit the formation of any bargain and thereby make it illegal. The question whether the legislature has done so depends on the interpretation of the legislative action. *In case of express prohibition or of declaring the act a crime there can be no doubt.* 176 Va. 500, 503, 11 S.E.2d 612, 614 (1940).

52 276 N.Y. 274, 11 N.E.2d 908 (1937).

53 *Id.* at 278, 11 N.E.2d at 909.

54 6A CORBIN, *CONTRACTS* 716 (1962).

55 Since nonenforcement is always a double penalty when applied to regulatory measures, it would seem that an unnecessary hardship results whenever the courts refuse to grant recovery for valuable benefits conferred.

little to remedy the ordinary injustices which inevitably result from denying relief to petty offenders.

D. *Penalty Implies Exclusion*

In 1943 the Ninth Circuit thought it detected a trend toward the complete rejection of Lord Holt's prohibition rule when petty offenders were involved:

A considerable number of recent cases have held that where the violation of a licensing statute is merely *malum prohibitum* and does not endanger the public health or morals and where penalties for non-compliance are specifically set forth and no declaration that a contract in relation thereto is void or its enforcement prohibited, such additional punishment should not be imposed unless the legislative intent is expressed or appears by clear implication.⁵⁶

If there were ever such a trend, it suffered an early death. The doctrine was too broad, for it would have allowed petty offenders to enforce executory, as well as executed contracts. Undoubtedly this explains why only a few scattered courts have applied the rule of *expressio unis exclusio alterius*, and then only in unusual circumstances.⁵⁷

The reasoning in these cases is of some interest, for it displays the futility of pursuing the will-o'-the-wisp of legislative intent. These courts disagree with Lord Holt simply because they read the legislative mind differently: "If such [prohibition] was the intent of the legislature it could easily have said so in express words."⁵⁸ This presumption of an exclusion is certainly as reasonable as Lord Holt's presumption of a prohibition; indeed, if legislative silence means anything, it probably means that the courts should not impose additional penalties.

E. *Quasi-Contractual Recovery*

The courts have been extremely reluctant to make exception to the strict doctrine of illegality by granting quasi-contractual relief.⁵⁹ Some of this reluctance probably springs from Lord Mansfield's refusal to apply his own remedy to illegal bargains.⁶⁰ However, most of it results from the tendency of the courts to favor simple answers which are capable of being inferred from legislative silence. Silence must mean either a flat no, or an uncompromising yes — it can never imply a carefully qualified yes. Thus, without some positive indication of intent, it is difficult to infer a legislative policy of recovery in quasi-contract, though not in contract. Such a limited recovery will be possible only when the

⁵⁶ *Macco Constr. Co. v. Farr*, 137 F.2d 52, 55 (9th Cir. 1943).

⁵⁷ The real basis for these decisions is probably "disproportionate hardship." Indeed, *Macco* relied heavily upon *Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 11 N.E.2d 908 (1937), which later cases have read as turning on the "disproportionate hardship" theory. For cases and materials reading *Rosasco* in this narrower sense see *Lewis & Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 308 P.2d 713 (1957) (dictum); *Wallach v. Katzonwitz*, 171 Misc. 287, 12 N.Y.S.2d 514 (1939), and 6A CORBIN, CONTRACTS § 1512, at 716 (1962).

⁵⁸ *McCullough Transfer Co. v. Virginia Sur. Co.*, 213 F.2d 440, 442 (6th Cir. 1954).

⁵⁹ *Wade, Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947). Cf., 6A CORBIN, CONTRACTS §§ 1535-36 (1962).

⁶⁰ *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775).

courts abandon the myth of legislative intent and treat the policy of non-enforcement like the judge-made doctrine that it is.

Encouragement can be derived from recent California cases, which appear to be moving, however hesitantly, toward allowing quasi-contractual recovery for benefits conferred under illegal bargains. In the leading case of *Norwood v. Judd*,⁶¹ a member of an unlicensed partnership sued for dissolution and an accounting of proceeds. Although the licensing statute specifically called for forfeiture of contractual rights, the supreme court found that the defending partner was not a member of the class protected by the statute. It then cast aside the old "penalty implies prohibition" rule:

The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase "in pari delicto" that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.⁶²

Norwood is significant because it ignores legislative intent, analyzing instead the policies supporting the doctrine of illegality. This enlightened approach was followed by a lower California court in *Wilson v. Stearns*,⁶³ which extended *Norwood* beyond the accounting for profits situation. The case involved a police power regulation which prohibited brokers from procuring exclusive employment agreements not having a definite termination date. The court allowed recovery for the more than \$17,000 sued for; apparently on a *quantum meruit* basis:

Where, as here, the alleged illegal transaction has been terminated; public policy is not served or public policy protected by denying one party to the contract relief against the other. Rather than permit the unjust enrichment of respondent George Stearns, we are disposed to apply the rule announced in the case of *Norwood v. Judd*.⁶⁴

Unfortunately, the *Norwood-Wilson* doctrine appears to have been limited by the California Supreme Court in the more recent case of *Lewis & Queen v. N. M. Ball Sons*.⁶⁵ The court implied that the rule of illegality allows recovery only when nonenforcement would result in unreasonable and disproportionate forfeitures or other penalties. This implication was strengthened by the citation of *Wilson v. Stearns* in support of the disproportionate penalties doctrine.⁶⁶

61 93 Cal. App.2d 276, 209 P.2d 24 (1949).

62 *Id.* at 288-89, 209 P.2d at 31.

63 123 Cal. App.2d 472, 267 P.2d 59 (1954).

64 *Id.* at 482, 267 P.2d at 66.

65 48 Cal.2d 141, 308 P.2d 713 (1957).

66 *Id.* at 141, 308 P.2d at 719.

The status of quasi-contract in California is not yet clear. At least one lower court decision since *Lewis & Queen* has refused to accept its implied limitation of the *Norwood-Wilson* approach.⁶⁷ In a case almost identical to *Wilson* but involving no disproportionate penalty, a district court read *Lewis & Queen* as approving the *Norwood* doctrine and *Wilson's* extension of it.⁶⁸ Thus, it appears that the California Supreme Court will have at least one more opportunity to reconsider its traditional approach.

V. Conclusion

Almost no one quarrels with the doctrine of illegality as applied to major criminal offenders. Since moral turpitude is involved, nonenforcement serves as an apt symbol of rejection and causes no unjust enrichment or disproportionate penalty. Nor does anyone quarrel with the doctrine when it is applied to the executory contracts of petty offenders. Since no performance has been rendered under the contract, nonenforcement only prevents the plaintiff from realizing anticipated profits; it cannot cause him out-of-pocket losses. However, the doctrine is unacceptable when it is applied to petty offenders who have rendered performance under a contract. True, nonenforcement in this situation may again prevent the dilution of statutory penalties by eliminating anticipated profits, but it does so at the cost of imposing a double penalty on the plaintiff and allowing the defendant to benefit from goods or services which do not rightly belong to him.

Quasi-contractual relief could eliminate the injustice of double punishment without impairing the effectiveness of statutory deterrents. Under this flexible remedy, the jury could be instructed to award the plaintiff an amount which would represent the reasonable value of goods delivered or services rendered, *while excluding all profit from the transaction*. Naturally, if the performance was defective, the plaintiff's recovery would be reduced accordingly. Also, all doubts as to the proper amount of recovery would be resolved in favor of the defendant. In this manner, justice would be done between the litigating parties, and the statutory penalty would be imposed upon the plaintiff without impairment. Both justice and statutory policy would be preserved.

J. Gregory Walta

⁶⁷ *Nichols v. Boswell-Alliance Constr. Corp.*, 181 Cal. App.2d 584, 5 Cal. Rptr. 546 (1960).

⁶⁸ *Id.* at 287-89, 5 Cal. Rptr. at 547-50.